STATE OF MICHIGAN

IN THE SUPREME COURT

WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM and WAYNE COUNTY RETIREMENT COMMISSION,

Plaintiffs-Counterdefendants-Appellees,

v

CHARTER COUNTY OF WAYNE,

Defendant-Counterplaintiff-Appellant,

and

WAYNE COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellant.

Docket No. Publ opn 5-9-13

Court of Appeals No. 308096

Wayne County Circuit Court
LC No. 10-013013-AW
Hon. Michael F. Sapala

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APPELLANTS WAYNE COUNTY AND WAYNE COUNTY BOARD OF COMMISSIONERS' APPLICATION FOR LEAVE TO APPEAL

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ORDERS APPEALED AND RELIEF SOUGHT

Defendant-Counterplaintiff-Appellant Charter County of Wayne and Defendant-Appellant Wayne County Board of Commissioners ("Wayne County") seek leave to appeal from the Court of Appeals' May 9, 2013 published opinion **(Ex 1)** reversing the Wayne County Circuit Court's September 29, 2011 Opinion and Order Granting Defendant Wayne County's Motion for Summary Disposition, and remanding for entry of partial judgment in favor of Plaintiffs-Counterdefendants-Appellees Wayne County Employees Retirement System and Wayne County Retirement Commission ("Retirement Commission"). Wayne County requests that this Court grant leave to appeal or, alternatively, that the Court enter a peremptory order reversing the Court of Appeals' decision and reinstating the decision of the Wayne County Circuit Court.

QUESTIONS PRESENTED FOR REVIEW

The Public Employees Retirement System Investment Act ("PERSIA"), MCL 38.1132 *et seq.*, provides that "the assets of [a retirement] system shall be for the exclusive benefit" of the participants and beneficiaries of the retirement system. The Wayne County Retirement System[1] includes an "Inflation Equity Fund" (IEF) that is used to issue discretionary bonus checks to retirees. In its 42-page published opinion, the Court of Appeals held that PERSIA pre-empted parts of a 2010 amendment to Wayne County's Retirement Ordinance authorizing a transfer of surplus funds from the IEF back into the Retirement Systems' defined benefit plans (which is where the funds came from in the first place) and as a credit and partial offset to fiscally-strapped Wayne County's annual required contribution ("ARC") to those defined benefit plans.

1. Even though the IEF funds never left the Retirement System, and those assets were at all times used solely to pay retirement benefits to system participants and their beneficiaries, the Court of Appeals concluded that the transfer of assets within the Retirement System violated PERSIA's "exclusive benefit" rule, MCL 38.1133(6), which provides that "the assets *of the system* shall be for the exclusive benefit of the participants and their beneficiaries." Did the Court of Appeals commit manifest error justifying this Court's intervention when it held that Wayne County's 2010 ordinance violated MCL 38.1133(6), when:

(a) the Retirement System's "assets" were at all times used for the sole purpose of paying retirement benefits, as required by the plain language of the MCL 38.1133(6);

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[1] The "Retirement System" is comprised of five "defined benefit plans" (i.e., plans that pay beneficiaries a definite, fixed, and periodic amount over a term of years after retirement), one "defined contribution plan" (i.e., a plan funded by both the employee's and Wayne County's preset contributions), and the IEF (a surplus fund created by ordinance and comprised of investment earnings generated by the defined benefit plans).

(b) the Court of Appeals failed to reconcile its interpretation of MCL 38.1133(6) with another provision of PERSIA, MCL 38.1140m, which expressly permits a substantially similar offset;

(c) the Court of Appeals' interpretation of PERSIA's exclusive benefit rule contradicts United States Supreme Court precedent applying ERISA's identical rule; and

(d) the Court of Appeals' overly zealous analysis improperly treats assets used to pay *discretionary* bonuses to retirees as "accrued financial benefits" for purposes of Const 1963, art 9, § 24?

The Court of Appeals would answer:	No.
The trial court would answer:	Yes.
Wayne County answers:	Yes.

2. The Court of Appeals further concluded that the credit and offset authorized under Wayne County's 2010 ordinance violated MCL 38.1133(6)(c), which prohibits a retirement system from engaging in a "transaction" that is, "either directly or indirectly . . . [a] transfer to, or use by or for the benefit of, the political subdivision sponsoring the system of any assets of the system for less than adequate consideration." According to the Court of Appeals, the ordinance "effectively" resulted in a "transfer" of "assets" from the Retirement System "to" Wayne County, and a "use by or for the benefit of" Wayne County. Did the Court of Appeals commit manifest error justifying this Court's intervention when it concluded that the ARC offset authorized by Wayne County's 2010 ordinance violated MCL 38.1133(6)(c), when:

(a) applying the plain language of MCL 38.1133(6)(c), the offset did not result in an *actual* "transfer to, or use by or for the benefit of" Wayne County;

(b) the context of MCL 38.1133(6) strongly suggests that transfers of system assets *within* a retirement system are not even regulated by the statute;[2] and

(c) the Court of Appeals, once again, failed to reconcile its interpretation of MCL 38.1133(6)(c) with MCL 38.1140m, which expressly permits similar offsets and further indicates the Legislature's intent that a transfer of system assets within the same retirement system does not constitute a prohibited "transaction"?

The Court of Appeals would answer:	No.
The trial court would answer:	Yes.
Wayne County answers:	Yes.

[2] As discussed further below, the statutory reference to "indirect" transfers does not change the fact that "assets" must actually leave the retirement system in order to be "transferred."

I. INTRODUCTION AND SUMMARY OF THE REASONS THE COURT SHOULD GRANT LEAVE TO APPEAL

Although PERSIA was enacted in 1965, this Court has never decided a case under MCL 38.1133, much less construed its "exclusive benefit" or "prohibited transaction" rules. In this case, the Court of Appeals invalidated a lawfully-enacted Wayne County ordinance governing a particular fund within the Wayne County Retirement System. In doing so, the Court of Appeals failed to defer to a local legislature, the Wayne County Board of Commissioners, which amended the Retirement System's structure to accomplish several goals. One goal was to shore up the Retirement System's defined benefit plans, which for years have been severely underfunded due, in large part, to the Wayne County Retirement Commission's operation of what is known as the Inflation Equity Fund ("IEF").

The IEF is a fund of assets *within* the Retirement System used solely to distribute discretionary bonus payments (commonly referred to as the "13th check" to differentiate them from the monthly promised benefits) to eligible retirees. Wayne County created the IEF in the mid-1980s to use excess investment earnings in the Retirement System's defined benefit plans to mitigate the effect of inflation. Under the County's retirement ordinance, the Retirement Commission has discretion to skim investment gains above a certain level from the defined benefit plans, place them into the IEF, and to distribute 13th checks from that surplus.

Economic circumstances have changed since the IEF was established. Rampant inflation does not erode the value of promised benefits like it once did, and defined benefit plans have not generated "excess" investment earnings for many years. But the Retirement Commission still prioritizes the IEF above the defined benefit plans. Although the assets of the defined benefit plans and the IEF are invested together, the Retirement Commission allocates 100% of investment losses to the defined benefit plans and none to the IEF assets. In other words, the

Retirement Commission shields from losses those assets used to pay only discretionary bonus checks (the IEF Retirement System assets), while assets used to pay constitutionally guaranteed benefits (the defined benefit plans' Retirement System assets) are depleted.[3] In fact, the Retirement Commission's own actuary "estimate[d] that the Wayne County Employees Retirement System would be approximately 90% funded . . . (as opposed to 67%) as of the last actuarial evaluation (September 30, 2009), if there had never been a 13th check program." (9/21/10 letter from J. Kermans) (attached at Tab B, Ex 3 to Wayne County's COA Br on Cross-Appeal).[4] The IEF has thus caused the health of the Retirement System and the constitutionally-guaranteed benefits it provides to deteriorate, requiring Wayne County to make up the resulting shortfalls through additional contributions from already-scarce county resources.

Wayne County therefore changed the design of the Retirement System by enacting Enrolled Ordinance 2010-514, which amended the County's retirement ordinance. That design change authorizes a transfer of some of the IEF's surplus Retirement System assets back into the defined benefit plans Retirement System assets to partially fulfill Wayne County's 2011 ARC, a savings of $32 million that helped to fill a budget gap that otherwise would have produced layoffs and reduced county services. The design change in the 2010 ordinance also limits the IEF to a total of $12 million, of which no more than $5 million may be distributed in any one year.

[3] The Court of Appeals fully acknowledged that the Retirement Commission does not allocate investment losses to the IEF. (COA Op at 35).

[4] Tab B is Wayne County's August 1, 2011, motion for summary disposition on Count III of its counterclaim.

The Court of Appeals committed manifest error when it invalidated the 2010 ordinance's credit and offset provision (along with the $12 million IEF cap)[5] based on an erroneous interpretation of two provisions of the Public Employees Retirement System Investment Act ("PERSIA"), MCL 38.1132 *et seq.* The Court of Appeals concluded that the credit and offset violated PERSIA's "exclusive benefit" rule, MCL 38.1133(6), which provides:

> The [retirement] system shall be a separate and distinct trust fund and the assets of the system shall be for the exclusive benefit of the participants and their beneficiaries . . ..

The Court of Appeals properly recognized that "[t]he 'system' here is the Wayne County Employees Retirement System," and that "the phrase 'assets of the system' is clearly broad in scope and comprehensive, and it would necessarily encompass all assets held by the Retirement System, including the defined benefit plan assets and the assets in the IEF." (COA Op at 17-18). The Court of Appeals even acknowledged that under the ordinance, the transferred "excess assets, once part of the IEF and now part of the defined benefit plan assets on the accounting records, ***were still to be used for the benefit of participants and their beneficiaries in the form of regular pension payments.***" (*Id.* at 18) (emphasis added). Nevertheless, even though no Retirement System assets were ever removed from the Retirement System, but were merely Retirement System assets transferred from the IEF to the defined benefit plans *within* the Retirement System for the exclusive purpose of paying retirement benefits, the Court of Appeals held that the County received an improper "benefit" by having its ARC reduced. But under the plain language of MCL 38.1133(6), the "exclusive benefit" rule is satisfied if "the assets of the

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[5] Technically, the Court of Appeals invalidated the $12 million IEF cap only as it applied, according to the Court of Appeals, "retroactively" to preclude the Retirement Commission from "using the preexisting $44 million in the IEF for 13th check distributions" once the $32 million is transferred back to the IEF (COA Op at 29). The Court of Appeals nonetheless held that the $12 million cap is fully permissible after the $32 million is thereafter distributed as 13th checks and the IEF is depleted to $12 million.

system" are used for the "exclusive benefit of the participants and beneficiaries." Because the ordinance simply allows Retirement System assets to be transferred *within* the Retirement System, the ordinance does not violate MCL 38.1133(6) because 100% of "the assets of the system" were used to pay benefit to participants.

Instead of focusing on whether "the assets of the system" (i.e., both IEF and defined benefit assets) were used "for the exclusive benefit of participants and their beneficiaries" as MCL 38.1133(6) requires, the Court of Appeals (despite acknowledging that Retirement System assets were comprised of both IEF and defined benefit fund assets) erroneously treated the IEF as though it were separate and distinct from the Retirement System assets, asserting that the "IEF, in and of itself, can be accurately characterized as a vested reserve belonging and in relationship to the Retirement System's participants as a whole, outside the reach of defendants . . . ." (COA Op at 19-20). *See also id.* at 23 ("[T]he IEF was created as a distinct and separate reserve" to pay 13th checks). Only by treating the IEF as a separate, independent set of assets could the Court of Appeals accuse Wayne County of "raiding" it, "dipping into" it, or "appropriating" money from it, when in fact the IEF is part of one, and only one, Retirement System.

That is the fundamental flaw in the Court of Appeals' opinion, for MCL 38.1133(6) requires only that the "assets of the system" as a whole be used "for the exclusive benefit of the participants and their beneficiaries." The Court of Appeals admitted that "IEF assets and defined benefit plan assets were pooled together in a single trust fund" which constituted the Wayne County Retirement System, and that "the redirected IEF assets would ***still ultimately go to retirees and survivor beneficiaries under the 2010 ordinance*** . . ." (COA Op at 23) (emphasis added). In short, participants and beneficiaries obtained 100% use of those Retirement System assets.

The Court of Appeals' erroneous interpretation of MCL 38.1133(6) is also incompatible with another provision of PERSIA, MCL 38.1140m, which expressly permits offsets even though they also "benefit" a public employer. Construing these provisions together shows that an ARC offset is not a "benefit" to the employer for purposes of MCL 38.1133(6) because system "assets" are never used for any purpose other than to pay retirement benefits.

These are not the only flaws in the Court of Appeals' "exclusive benefit" rule analysis. In erroneously construing MCL 38.1133(6), the Court of Appeals tersely dismissed United States Supreme Court precedent holding that there is no violation of ERISA's exclusive benefit rule if plan assets are ultimately used to pay obligations to participants. See *Hughes Aircraft Co v Jacobson*, 525 US 432; 119 S Ct 755; 142 L Ed 2d 881 (1999). Moreover, in its zeal to preserve the pre-2010 ordinance IEF intact, the Court of Appeals disregarded this Court's decisions in *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), and *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011), by paradoxically treating IEF assets as though they are "accrued financial benefits" while at the same time finding that they do not meet the requirement of Const 1963, art 9, § 24. Even though 13th checks, which do not even come into existence until after an employee retires, neither "increase or grow over time" nor arise "on account of service rendered in each fiscal year, the Court of Appeals strained to find that the IEF could not be reduced to $12 million and with the remainder left in the defined benefit plans even without a credit against Wayne County's ARC."[6]

The Court of Appeals further held that the offset permitted by Wayne County's 2010 ordinance violated MCL 38.1133(6)(c), which prohibits a retirement system from engaging in a "transaction" that is "either directly or indirectly . . . [a] transfer to, or use by or for the benefit of, the political subdivision sponsoring the system of any assets of the system for less than adequate consideration." According to the Court of Appeals, the offset "effectively" resulted in a "transfer" of "assets" from the Retirement System "to" Wayne County, and an "effective" "use by or for the benefit of" Wayne County. Again, the Court of Appeals' analysis is not supported by the statute. *First*, MCL 38.1133(6)(c) requires an actual "transfer" or "use" of a system's "assets," not an "effective" one. *Second*, construing subsection (c) with the rest of MCL 38.1133(6), including various other prohibited "transactions," it is apparent that the statute does not even come into play unless the "transaction" is with a party *outside of the retirement system*, which clearly is not the case here. *Third*, the Court of Appeals, once again, failed to harmonize MCL 38.1133(6)(c) with MCL 38.1140m, which expressly permits similar offsets and further indicates the Legislature's intent that an intra-system transfer does not constitute a prohibited "transaction."

This litany of errors and internal inconsistencies in the Court of Appeals' published decision forces Wayne County to seek leave to appeal pursuant to MCR 7.302(B)(1), (2), (3),

[6] The significance of this issue is amplified by a recent lawsuit filed against the City of Detroit challenging the city's decision to dissolve its 13th check program and instead use assets from the city's "Retiree Excess Earnings Reserve Fund" to pay pension obligations. In their lawsuit, the General Retirement System of the City of Detroit and its board of trustees claim that the city's decision violates art 9, § 24 as well as the Michigan Constitution's prohibition against impairment of contracts, Const 1963, art 1, § 10. (See Complaint in *General Retirement System of the City of Detroit v City of Detroit*, Wayne County Circuit Court No. 13-002368-CZ (**Exhibit 2**)).

and (5). Appeal to this Court is warranted under MCR 7.302(B)(1) if the "issue involves a substantial question as to the validity of a legislative act." The Court of Appeals has invalidated a lawfully-enacted Wayne County ordinance based on a fundamentally erroneous construction of MCL 38.1133(6).

Appeal to this Court is proper under MCR 7.302(B)(2) if "the issue has significant public interest and the case is by or against the state or one of its . . . subdivisions," and appeal is proper under MCR 7.302(B)(3) if "the issue involves legal principles of major significance to the state's jurisprudence." The Court of Appeals developed an unprecedented and critically-flawed interpretation of PERSIA's "exclusive benefit" and "prohibited transaction" provisions to strike down the key features of the 2010 ordinance, requiring Wayne County to pay $32 million to replace funds that the Court of Appeals has ordered back into the IEF from the defined benefit plans.

Additionally, the decision of the Court of Appeals is "clearly erroneous and will cause material injustice." MCR 7.302(B)(5). Consequently, the Court of Appeals' decision simply cannot be allowed to stand. This Court should grant leave to appeal or enter an order peremptorily reversing the Court of Appeals' decision and reinstating the trial court's decision in its entirety.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Retirement System and the IEF

The Retirement System was established in 1944 for the benefit of eligible Wayne County retirees. (COA Op at 6). The Retirement System consists of five defined benefit plans, one defined contribution plan, and the "Inflation Equity Fund" ("IEF"). (See *id.* at 6, 7.).[7]

[7] As explained by the Court of Appeals:

Footnote continued on next page ...

The defined benefit plans' assets are used to pay the twelve monthly checks to all eligible retirees and beneficiaries. (See *id.* at 2). The IEF, on the other hand, is a unique fund that the County Board of Commissioners created in 1986 that provides for discretionary bonus checks, known as "13th checks," to eligible retirees – from excess investment earnings generated during economic boom times. (See *id.* at 7). The IEF is governed by § 141-32 of the Wayne County Code of Ordinances, as amended by the 2010 ordinance. (*Id.*).

The defined benefit plans are funded by employer contributions from the County and by investment returns (see Plaintiffs' Answer, ¶ 13, attached at Tab B, Ex 6 to Wayne County's COA Br on Cross-Appeal). On the other hand, the IEF was established by a transfer of funds from the defined benefit plans to the IEF.[8] (See Wayne County Retirement System Inflation

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Footnote continued from previous page ...

> In general terms, a "defined benefit plan" is a "plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to employees over a period of years, usu. for life, after retirement[,]" which "are measured by and based on various factors such as years of service rendered and compensation earned." Black's Law Dictionary (7th ed). A "defined contribution plan" is "an employee retirement plan in which each employee has a separate account – funded by the employee's contributions and the employer's contributions (usu. in a preset amount), the employee being entitled to receive the benefit generated by the individual account." *Id.* [COA Op at 6, n 7.]

The system's defined contribution plan is not at issue in this case. The IEF is described and explained in greater detail immediately below.

[8] While the Court of Appeals implied that the IEF was developed during inflationary times and originally intended to replace cost-of-living adjustments (COLAs), that is completely irrelevant, regardless of whether it is true. See *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 552; 777 NW2d 1 (2009) ("We may not speculate regarding the Legislature's probable intent, nor may we 'inquire into the knowledge, motives, or methods of the Legislature.'") (citation and some internal quotation marks omitted); *Green Oak Twp v Munzel*, 255 Mich App 235, 240; 661 NW2d 243 (2003) (explaining that courts may not speculate about the probable intent of a legislative body beyond the language expressed in the statute or ordinance). Moreover, times and circumstances change, and non-contractual legislative enactments generally cannot bind subsequent legislatures. *Studier v Mich Pub School Employees' Retirement Bd*, 472 Mich 642, 668; 698 NW2d 350 (2005).

Equity Adjustment (13th Month Checks) for the years 1985-1986, attached at Tab B, Ex 18 to Wayne County's COA Br on Cross-Appeal). Over the years, the IEF has been maintained by additional transfers from the defined benefit plans. (See *id.* for the years 1985-2009.) Transfers from the defined benefit plans to the IEF are authorized when the rate of investment return in any given year is above a "threshold" rate that the Retirement Commission sets, in which case the Retirement Commission, subject to its fiduciary duties, may choose to transfer the "excess" investment returns to the IEF. (See Retirement Ordinance 141-32, attached at Tab C, Ex 1-D to Wayne County's COA Br on Cross-Appeal).[9] The Retirement Commission, in turn, invests the defined benefit plans' assets together with the funds maintained in the IEF account. (Preliminary Injunction 12/10/10 Transcript, 49:13-50:13, attached at Tab B, Ex 8 to Wayne County's COA Br on Cross-Appeal). Although it invests the funds together, the Retirement Commission holds the defined benefit plans accountable for any investment losses, but holds the IEF harmless from those losses. (See Ps' Resp to Ds' First Set of Discovery, Requests for Admission Nos. 1 and 2, attached at Tab C, Ex 19 to Wayne County's COA Br on Cross-Appeal) ("Plaintiffs/Counter-Defendants admit that the IEF does not share in investment losses of the Retirement System.").

B. The Nature of the Discretionary 13th Check

All eligible retirees and beneficiaries of the defined benefit plans are entitled to twelve monthly checks each year from the defined benefit plans' assets (see 5/11/11 Deposition of Robert Grden, 60:22-62:17, and Annual Actuarial Valuation Report, 2009, attached at Tab C, Exs 4 and 7, A-4 to Wayne County's COA Br on Cross-Appeal). However, some retirees and beneficiaries are also eligible for a discretionary bonus from the IEF, which is commonly

[9] Tab C is Wayne County's August 1, 2011 motion for summary disposition as to Plaintiffs' claims. Unless otherwise noted, "Tab" references are to the exhibits filed with Wayne County's brief on cross-appeal in the Court of Appeals.

referred to as the "13th Check Fund."[10] (See CBA Chart, attached at Tab C, Ex 27 to Wayne County's COA Br on Cross-Appeal) (showing which collective bargaining agreements of the 20 CBAs produced in this case actually address eligibility for 13th Checks); Ds' Resp to Ps' First Set of Discovery Requests, Requests for Admissions Nos. 55-58, Tab C, Ex 22 (addressing eligibility language in four CBAs); Pre-Amendment Chart, Tab C, Ex 1 (showing discretionary distribution language contained in all pre-amendment versions of § 141-32); 5/27/11 Deposition of Judith Kermans, 26:17-27:5, Tab C, Ex 5; 5/11/11 Deposition of Robert Grden, 31:9-20, Tab C, Ex 4).

Since the IEF was established, the Retirement Commission has had discretion to distribute 13th checks. (See *id.* at 7-8). The discretionary 13th check distributions made from the IEF *are not earned for service in the year in which service is actually rendered.* Moreover, the method that the Retirement Commission has used to determine 13th check amounts has varied over the years. (See 2005 13th Check Amounts Final Results, 2007 13th Check Amounts Final Results (Revised), 2008 13th Check Amounts Final Results, and Wayne County Retirement System Inflation Equity Adjustment (13th Checks) for the years 1985-2007 and 1996-2009 (showing the average 13th Check for 2004 at $2,380, for 2005 at $2,361, for 2006 at $2,030, for

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[10] Notably, § 141-37 of the Retirement Ordinance provides for several accounting "reserves" within the Retirement System and states that "[t]he descriptions of the reserve accounts shall be interpreted to refer to the accounting records of the retirement system and not to the segregation of assets by reserve account." Section 141-37 does not even mention the IEF, which is addressed in an entirely separate section of the Retirement Ordinance, § 141-32. (See COA Op at 7). Moreover, there is no disputing the fact, as the trial court recognized, that the Retirement Commission treats IEF assets differently than defined benefit plan assets. As discussed further below, and as the Court of Appeals acknowledged, it is beyond question that the Retirement Commission's actuary does not include IEF assets in calculating the County's annual required contribution to the defined benefit plans, and that the Retirement Commission holds the IEF harmless from investment losses. Thus, whether or not the IEF's assets are physically maintained in a separate "account" is irrelevant.

2007 at $1,686 and for 2008 at $1,703), attached at Tab C, Exs 9-12 to Wayne County's COA Br on Cross-Appeal). See also 5/27/11 Deposition of Judith Kermans, 105:10-108:6, attached at Tab C, Ex 5 to Wayne County's COA Br on Cross-Appeal).

Regardless of the method chosen, each year the IEF funds that the Retirement Commission makes available for 13th checks are broken down into a unit value based upon the number of "eligible persons." (See, e.g., 2005 13th Check Amounts Final Results, attached at Tab C, Ex 9 to Wayne County's COA Br on Cross-Appeal). Once the Retirement Commission determines the unit value, it is multiplied by the number of units each "eligible person" has, which is based upon the number of years an "eligible person" has been retired and the number of years an "eligible person" worked, subject to a maximum. (See 6/2/11 Deposition of Ronald Yee, 62:13-63:16, attached at Tab C, Ex 13 to Wayne County's COA Br on Cross-Appeal; 2005 13th Check Amounts, Tab C, Ex 9).

Over the years, the Retirement Commission has repeatedly voted to reduce 13th check amounts depending on the value of retirees' guaranteed monthly payments from the defined benefit plans. (See 10/1/10 Retirement Commission Meeting Minutes, WCRC000338, attached at Tab C, Ex 10 to Wayne County's COA Br on Cross-Appeal) (Mr. Hutting moved to reduce 13th check amounts by 25% for pensions over $50,000, 50% for pensions over $75,000 and 65% for pensions over $100,000); 9/29/09 Retirement Commission Meeting Minutes, WCRC000352, Tab C, Ex 15 (Mr. Grden moved to reduce 13th check amounts by 90% for retirees with pensions over $100,000); 7/15/11 Deposition of Augustus Hutting, 48:23-50:7, Tab C, Ex 16 (providing that the Retirement Commission has the authority to reduce 13th checks based on pension value); 6/2/11 Deposition of Ronald Yee, 73:18-74:12, Tab C, Ex 13 (same)). In addition, the Retirement Commission has always had discretion to restrict issuing 13th checks depending on the effective date of a retiree's pension. (See Pre-Amendment Charts, attached at Tab C, Ex 1 to Wayne County's COA Br on Cross-Appeal).

C. Wayne County's 2010 Amendment to Its Retirement Ordinance

On September 30, 2010, the Wayne Board adopted the 2010 ordinance, which, among other things, amended Wayne County Ordinance § 141-32 to change how the IEF is maintained and administered. (See Wayne County Enrolled Ordinance No. 2010-514, attached as **Exhibit 3**) (from Tab C, Ex 20 to Wayne County's COA Br on Cross-Appeal). Section 141-32 now states:

> (a) The retirement commission shall maintain a reserve for inflation equity provided that the fund shall be limited to no more than $12,000,000.
>
> (b) (1) Subject to the limit of (a) above, the retirement commission may credit the reserve at the end of each fiscal year with a portion of the excess, if any, of the rate of return on the actuarial value of retirement system defined benefit assets over the rate established for this purpose by the retirement commission.
>
> (2) The retirement commission shall establish the portion of the reserve fund available for distribution to retired members and survivor beneficiaries; provided that portion shall not exceed $5,000,000.00.
>
> (3) The calculation of "defined benefit assets" shall exclude the county's retirement contribution for that fiscal year as set forth in section 141-36 provided the amount in the reserve fund in excess of the limit set forth in subsection (a) above shall be debited from the reserve fund and credited to the defined benefit plan assets and such credit shall offset and/or reduce the county's defined benefit contribution requirement and thereafter be considered defined benefit plan assets.
>
> (c) The retirement commission may restrict the distribution and/or the minimum permanent pension to retired members and survivor beneficiaries having a pension effective date prior to dates selected from time to time by the retirement commission.
>
> (d) The formula for the distribution shall be as from time to time determined by the retirement commission and shall take into account the period of retirement and period of credited service.
>
> (e) Nothing in this section shall preclude the county from reducing or eliminating its contribution for a fiscal year in which defined benefit assets exceed defined benefit liabilities.

(f) Within nine months of first annual distribution from this fund, the CFO shall explore and report to the county commission whether it is advantageous to issue bonds as a strategy to fully fund the retirement system and reimburse the inflation equity fund of $32,000,000.00.

The 2010 ordinance did not eliminate the IEF's discretionary bonus program, but altered it in two ways:

1. The IEF can hold no more than a total of $12 million and distribute no more than $5 million annually.

2. Any amount in the IEF in excess of $12 million must be debited from the IEF and credited as an offset against the County's annual contribution to the Defined Benefit Plans. (See § 141-32(a), (b), and (c)).

D. Plaintiffs' Lawsuit to Invalidate the IEF Amendments

Soon after the Wayne Board enacted the 2010 ordinance, the Retirement Commission and the Retirement System sued to challenge it. (See First Amended and Restated Complaint for Writ of Mandamus, Declaratory Judgment and Injunctive Relief, attached at Tab E to Wayne County's COA Br on Cross-Appeal). Plaintiffs claimed that the transfer of IEF funds into the defined benefit plans resulting from the credit and offset and monetary limit provisions of the 2010 ordinance (1) violate MCL 38.1140m, which Plaintiffs alleged places any offsets of the County's annual required contribution within the Retirement Commission's sole discretion, and (2) diminish or impair payment of the 13th check in violation of Const 1963, art 9, § 24. (*Id.* at ¶¶ 17-18). Plaintiffs asked the trial court to repeal the 2010 ordinance in its entirety and to reinstate §§ 141-32 and 141-36 as they existed prior to the amendment. (*Id.* at ¶¶ 72-73).

On August 1, 2011, after discovery closed, Wayne County moved for summary disposition on all of Plaintiffs' claims. (See Wayne County's Motion for Summary Disposition Dismissing Plaintiffs' Complaint (filed Aug 1, 2011), attached at Tab C to Wayne County's COA Br on Cross-Appeal). As to Plaintiffs' claim under Const 1963, art 9, § 24, Wayne County identified several bases for concluding that 13th check payments are discretionary and not accrued financial benefits, and that art 9, § 24 therefore did not apply:

First, there are no collective bargaining agreements that entitle any person to receive a 13th check. Instead, some CBAs only provide that *if* 13th checks are issued, then certain union members are eligible to receive them. (See, e.g., CBA Chart, attached at Tab C, Ex 27 to Wayne County's COA Br on Cross-Appeal (highlighting which CBAs out of the approximately 20 CBAs produced in this case actually address 13th checks with supporting exhibits)).

Second, as Plaintiffs admitted during discovery, 13th checks have historically varied in amount each year. (See, e.g., Ps' Resp to Ds' First Set of Discovery, Requests for Admissions No. 22, attached at Tab C, Ex 19 to Wayne County's COA Br on Cross-Appeal).

Third, the Retirement Commission itself, as recently as 2003, rejected a claim by retirees that benefits payable from the IEF were "accrued financial benefits." (See 6/30/03 Retirement Commission Meeting Minutes, WCRC000495, attached at Tab C, Ex 28 to Wayne County's COA Br on Cross-Appeal).[11]

Fourth, Plaintiffs admitted that 13th check payments are entirely discretionary. (See 12/10/10 Preliminary Injunction Transcript, 65:11-22, attached at Tab C, Ex 17 to Wayne County's COA Br on Cross-Appeal). Specifically, Augustus Hutting, a Retirement Commission

[11] The issue arose after the IEF Ordinance was amended in 2000 to delete a requirement that if 13th checks were issued in a given year they must account for at least 20%, and no more than 50%, of the IEF. When certain retirees challenged the amendment before the Retirement Commission, the Retirement Commission rejected their claim that 13th checks were accrued financial benefits. (*Id.*) In fact, it was the Retirement Commission that requested the 2000 amendment, and it even participated in the drafting process. (See 6/16/11 Deposition of Ronald Yee, 41:13-42:17, attached at Tab C, Ex 13 to Wayne County's COA Br on Cross-Appeal; GRS&C 6/16/2000 Letter, Tab C, Ex 30, WCRC001030-001031 (regarding § 26.01(c)); Retirement System 6/30/00 Letter, Tab C, Ex 31, WCRC001009 & 001024-001025 (regarding § 141-32(c)); 6/23/11 Deposition of Richard Noelke, 26:1-15, Tab C, Ex 29 (agreeing that the 2000 amendment was initiated by the Retirement Commission)).

Trustee since 1991, admitted in his deposition that 13th checks were always discretionary and did not need to be paid out yearly, even prior to the 2000 amendment. (See 7/15/11 Deposition of Augustus Hutting, 8:15-17; 6:2-4; 13:14-18 and 14:13-18, attached at Tab C, Ex 16 to Wayne County's COA Br on Cross-Appeal).

Fifth, the decision whether to distribute 13th checks, including the amounts of the distributions, is made only *after* an employee retires and has been retired for at least one year. As a result, they do not convey a benefit earned during the year that the benefit was given, so art 9, § 24, simply does not apply to these discretionary bonus checks.

As to Plaintiffs' claim that the credit and offset provisions in the 2010 ordinance conflicted with MCL 38.1140m, Wayne County argued that the statute did not apply because it only applied to offsets using defined benefit plan assets, whereas the Retirement Commission has always treated IEF assets as separate and distinct from defined benefit plan assets, and thus outside the purview of MCL 38.1140m. (See Tab C to Wayne County's COA Br on Cross-Appeal, p 13). Most critically, as Plaintiffs have repeatedly admitted, IEF assets are not included in the actuarial calculation of the County's annual contribution to the defined benefit plans. (See Preliminary Injunction Transcript, 46:15-19 (Racine), attached at Tab C, Ex 17 to Wayne County's COA Br on Cross-Appeal; Ps' Resp to Ds' First Set of Discovery, Requests for Admissions Nos. 14, 15 and 28, Tab C, Ex 19). Moreover, the Retirement Commission holds the IEF's assets harmless from investment losses, instead allocating those losses solely to the assets in the defined benefit plans. (See Ps' Resp to Ds' First Set of Discovery, Requests for Admission Nos. 1 & 2, attached at Tab C, Ex 19 to Wayne County's COA Br on Cross-Appeal) ("Plaintiffs/Counter-Defendants admit that the IEF does not share in the investment losses of the Retirement System.")) Finally, whereas the defined benefit plan assets are used for paying monthly retirement benefits, the Retirement Commission uses IEF assets to distribute the discretionary bonus checks.

Finally, Wayne County addressed Plaintiffs' arguments that the 2010 ordinance violated the "exclusive benefit rule" and the prohibited transaction rule.[12] (See Tab C to Wayne County's COA Br on Cross-Appeal, p 14-17). While much of Wayne County's argument was based upon relevant case law,[13] Wayne County pointed to two key facts demonstrating that the 2010 ordinance did not violate either the exclusive benefit or prohibited transaction rules. First, Wayne County noted that pursuant to the 2010 ordinance, no assets were transferred out of the Retirement System and thus the assets "will continue to be used by and for the benefit of the Retirement System." (*Id.* at 16). Second, Wayne County noted that the credit and offset provision included in MCL 38.1140m permitted the same time of credit and offset provision created by the 2010 ordinance. (*Id.* at 17). Thus, Wayne County argued, since Plaintiffs did not claim the credit and offset provisions of MCL 38.1140m were unlawful, and in fact relied upon them, the substantially similar credit and offset provisions in the 2010 ordinance also did not violate the exclusive benefit rule or the prohibited transaction rule. (*Id.*).

Plaintiffs filed their own motion for summary disposition, to which Wayne County timely responded. (See Tab D to Wayne County's COA Br on Cross-Appeal).

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[12] Since Plaintiffs' prohibited transaction rule claim was primarily based upon the prohibited transaction rule found in Internal Revenue Code § 503(b), Wayne County's argument in its summary disposition briefing specifically addressed that provision. (See Tab C to Wayne County's COA Br on Cross-Appeal, pp 16-17).

[13] That case law, including a decision from the United States Supreme Court addressing ERISA's nearly identical exclusive benefit rule, is discussed in detail below.

E. The Trial Court's Decision To Uphold the 2010 Ordinance

On September 7, 2011, the trial court heard the parties' cross-motions for summary disposition. (See Sept 7, 2011 Hearing Transcript, **Exhibit 4**) (from Tab H to Wayne County's COA Br on Cross-Appeal)). On September 29, 2011, it issued its "Opinion and Order of the Court Granting Defendant Wayne County's Motion for Summary Disposition." (See 9/29/11 Opinion and Order, **Exhibit 5** (from Tab F to Wayne County's COA Br on Cross-Appeal)). The court held that "there are two main issues that compel the result in this case." (*Id.* at 3.) "The first is whether the IEF is an accrued financial benefit and the second is whether the offset violates MCL 38.1140m." (*Id.*)

The trial court agreed with Wayne County that the plain language of § 141-32 is clearly discretionary and does not create a contractual relationship, and that the relevant collective bargaining agreements "also do not mandate that the payment be made." (*Id.*) The trial court supported that determination with the undisputed evidence that Wayne County submitted on the issue:

> Defendant provided the deposition testimony of Augustus Hutting, a Retirement Commission Trustee since 1991. Mr. Hutting testified that the Commission was not required to pay the 13th check. However, if the 13th check was paid, the Commission had to pay out between 20 and 50 percent in order to comply with the ordinance. Furthermore, in order for a contractual right to exist, a legislative act must clearly intend to create a contractual right. Based on the evidence submitted by the parties, the court agrees that the ordinance makes the payment discretionary.
>
> Moreover, the court agrees with Defendant that although the collective bargaining agreements referenced eligibility for the 13th check payment, none of the agreements require or mandate the payment of the 13th check. An "eligible" retiree is qualified to receive a benefit if one is paid, but is not entitled to receive a benefit. The 13th checks are not earned for service in the year rendered. [*Id.* at 3-4.]

Having found that "the IEF is not an accrued financial benefit," the trial court concluded that the credit and offset provisions of the 2010 ordinance do not violate Const 1963, art 9, § 24. (*Id.* at 4.)

The trial court then turned to Plaintiffs' claim that the offset violates MCL 38.1140m. The court summarized Wayne County's argument as follows:

> Defendant argues that the IEF funds may be used to partially offset the County's contribution to the Defined Benefit Plans and that Ordinance 2010-514 does not violate MCL 38.1140m. Defendant maintains that the IEF assets do not constitute assets of the Defined Benefit Plans and that Plaintiffs have admitted that the IEF assets are not included in the actuarial calculation of the County's annual contribution. Defendant further argues that MCL 38.1140m does not address or prohibit the sources from which the annual contribution may be funded, other than stating that defined benefit plan assets may not be used to fund the contribution unless the plan is overfunded. [*Id.*]

The trial court observed that Plaintiffs' position essentially was that the statute "does not permit the County to declare certain monies as surplus or excess and therefore subject to offset. Moreover, even if the Retirement System was more than fully funded, the statute provides that there may be an offset and the County cannot assess an offset unless the System consents." (*Id.*) The trial court again agreed with Wayne County, holding that "MCL 38.1140m does not address or prohibit the transfer of funds from the IEF reserve to meet the County's Annual Retirement Contribution Obligation. Therefore, Defendant is entitled to summary disposition on this issue." (*Id.*)

Finally, the trial court summarily rejected Plaintiffs' remaining claims that the transfer of funds from the IEF to the defined benefit plans violated the "exclusive benefit rule" and constituted a prohibited transaction. (*Id.*) In short, the court "agree[d] with the arguments set for in [Wayne County's] brief on these issues and [found] that the other claims raised in the Complaint and also in Plaintiffs' brief [were] without merit." (*Id.*).

F. The Court of Appeals' Published Opinion Reversing the Trial Court's Decision

In the Court of Appeals, Plaintiffs again primarily focused on the arguments (1) that the 2010 ordinance impaired accrued financial benefits in violation of art 9, §24, and (2) that the credit and offset in the 2010 ordinance violated MCL 38.1140m.

The Court of Appeals' opinion paid little heed to those arguments, conceding that the credit and offset in the 2010 ordinance did not violate MCL 38.1140m. (See COA Op at 29 ("[W]e have not invalidated the offset pursuant to MCL 38.1140m . . . .") and 30 ("MCL 38.1140m appears to only address ARCs relative to defined benefit plans . . . ."). The Court of Appeals also held that "payment of a 13th check ***cannot be viewed as an accrued financial benefit***, where there is no vested or enforceable right to a 13th check given the discretionary distribution language that has always been part of the IEF ordinance, along with the lack of any CBA language requiring disbursement of a 13th check." (*Id.* at 19). (emphasis added).

The Court of Appeals nonetheless strained to invalidate the credit and offset provisions in the 2010 ordinance, relying on its own analysis of the so-called "plain language" of PERSIA's "exclusive benefit rule" and "prohibited transaction rule," both of which the Court of Appeals found were violated. (See, e.g,. *id.* at 18, 26). [14] As to the "exclusive benefit rule," the Court of Appeals said that although no assets were ever removed from the Retirement System, and instead were merely transferred to the defined benefit plans for the exclusive purpose of paying retirement benefits, the County received a "benefit" because its ARC was reduced. Regarding

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[14] Wayne County submits that the Court of Appeals' flawed analysis was the product of its misguided view that although not actually protected by the constitution "the 13th Check program itself could arguably be viewed as an accrued financial benefit." (COA Op at 20, n 23). As further discussed below, the Court of Appeals' faulty analysis directly conflicts with this Court's precedent.

the "prohibited transaction rule," the Court of Appeals concluded that the offset "effectively" resulted in a "transfer" of "assets" from the Retirement System "to" Wayne County, and an "effective" "use by or for the benefit of" Wayne County.

Finally, the Court of Appeals found several other provisions of the 2010 ordinance to be invalid, at least in part. The Court of Appeals summarized its holding with respect to those other provisions as follows:

> [W]e invalidate and strike down those provisions in the 2010 ordinance, as codified in WCCO, §§ 141-32 and 141-36, regarding the transfer or reallocation of IEF assets, the offset, the amortization caps and ARC formula, the potential reimbursement of the $32 million IEF excess, and the County's control over an offset decision relative to true defined benefit plan surpluses. The net effect of our ruling is that the excess IEF assets amounting to approximately $32 million must be debited from the defined benefit plan assets and allocated or credited back to the IEF in the accounting records, with the County being left responsible to comply with its ARC obligations absent consideration of the $32 million offset. We, however, also hold that the remaining provisions in the 2010 ordinance are sound and remain intact, including the IEF funding and disbursement caps, as prospectively limited. [COA Op at 41-42.][15]

III. ARGUMENT

A. Standard of Review and Controlling Statutory Interpretation Principles

This appeal concerns the proper interpretation of PERSIA's "exclusive benefit" (MCL 38.1133(6)) and "prohibited transaction" (MCL 38.1133(6)(c)) provisions, which presents a question of law that this Court reviews de novo. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). In *People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009), the Court reiterated the controlling principles governing the interpretation of a statute:

> The Court's responsibility in interpreting a statute is to determine and give effect to the Legislature's intent. The statute's words are the most reliable

[15] Although Wayne County does not agree with *any* aspect of the Court of Appeals' decision to strike down these provisions, the County has chosen to focus on the Court of Appeals' decision to invalidate the credit and offset provisions (§ 141-32(b)(3) and the corresponding reference in § 141-36(a)(2)) and the prospective only application of the IEF funding and disbursement caps.

> indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute. Once the Court discerns the Legislature's intent, no further judicial construction is required or permitted "because the Legislature is presumed to have intended the meaning it plainly expressed." [Citations omitted.]

"These traditional principles of statutory construction . . . force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility." *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999). As discussed further below, the Court of Appeals' decision in this case completely disregards these principles.

B. The Court of Appeals misconstrued MCL 38.1133(6) in concluding that the transfer of assets from the discretionary IEF back into the defined benefit plans resulted in the assets being used for other than the "exclusive benefit" of the participants and their beneficiaries.

The Court of Appeals clearly erred when it construed PERSIA's "exclusive benefit" rule, MCL 38.1133(6), to invalidate the 2010 ordinance's credit and offset provision, under which Wayne County transferred $32 million from the IEF back into the defined benefit plans as a partial offset to the County's annual required contribution. Because the assets transferred never left the Retirement System, and instead were used exclusively for the benefit of participants and their beneficiaries, there was no violation of MCL 38.1133(6) as a matter of law. That Wayne County's ARC was reduced as a result of the transfer within the Retirement System does not mean that the funds were not used for the exclusive benefit of those retirees.

MCL 38.1133(6) provides, in relevant part, that "[t]he system shall be a separate and distinct trust fund and the assets of the system shall be for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the system."[16] The Court of Appeals correctly observed that the "system" at issue is the Wayne County Retirement System, that it includes all of the "assets" contained in both the defined benefit plans and the IEF, and that the term "assets" means "the total of the cash and investments of a system valued at market." (COA Op at 17-18, citing MCL 38.1133(6) and MCL 38.1132a). The Court of Appeals went astray in concluding that an *intra*-system transfer of "assets" from the IEF *back into the defined benefit plans* was somehow not for the "exclusive benefit" of the participants and their beneficiaries. To the contrary, at all times those assets remained in the Retirement System to pay retirement benefits.

The Court of Appeals completely misconstrued MCL 38.1133(6) as it applies to the 2010 ordinance. MCL 38.1133(6) is plain and unambiguous, requiring nothing more than that the "assets" of a retirement system, i.e., its "cash and investments," be used for the "exclusive," or sole, "benefit" of the participants and their beneficiaries.[17] Because IEF "assets" *were never removed from the Retirement System*, and instead were simply transferred to the defined benefit plans *for the exclusive purpose of providing benefits to participants and their beneficiaries*, MCL 38.1133(6) simply was not violated. Although the transfer reduced the amount of money that Wayne County would otherwise have had to contribute to the defined benefit plans, there was no "benefit" provided to the County within the meaning of MCL 38.1133(6) because the Retirement

[16] The statute was amended effective March 28, 2013. The exclusive benefit rule was moved to subsection (8) in the new statute.

[17] Wayne County does not dispute that "exclusive" is commonly defined as "'not divided or shared with others [or] single or independent; sole.'" (COA Op at 18, quoting *Northville Charter Twp v Northville Pub Schs*, 471 Mich 745, 752; 691 NW2d 424 (2005)) (citations and some internal quotation marks omitted). As for the term "benefit," there is no question that a common definition is the one that the Court of Appeals used, i.e., "something that is advantageous or good." (*Id.*, quoting *Ottawa Co v Police Officers Ass'n of Mich*, 281 Mich App 668, 673; 760 NW2d 845 (2008)). But as discussed below, it only tells part of the story and must be considered in the context of the statute as a whole.

System's "assets" were not reduced by the transfer. The statute's term "exclusive benefit" refers to the retirement system's "assets" and how they are used. MCL 38.1133(6) is not concerned with whether the employer's own interests are also advanced so long as the system's actual "assets" (i.e., its "cash and investments") are not used for anything other than the "exclusive benefit" of the participants and their beneficiaries.

1. The Court of Appeals improperly focused on the terms "exclusive" and "benefit" in isolation and without considering the rest of MCL 38.1133(6).

The Court of Appeals failed to consider the statutory language "exclusive benefit" in its proper context. Instead of construing the statute in context and as a whole, the Court of Appeals simply plucked dictionary definitions for the terms "exclusive" and "benefit" in MCL 38.1133(6). But as this Court explained in *People v Vasquez*, 465 Mich 83, 109; 631 NW2d 711 (2001), "exclusive reliance on dictionary definitions can blur, as much as clarify, the meaning of a word." By viewing the words "exclusive" and "benefit" in isolation instead of reading the language of MCL 38.1133(6) in its entirety, the Court of Appeals took the statutory language "exclusive benefit" completely out of context.

A "statutory term cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme." *Breighner v Mich High School Athletic Ass'n*, 471 Mich 217, 232; 683 NW2d 639 (2004). A statutory term like "exclusive benefit" "does not stand alone, and thus it cannot be read in a vacuum." *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003). "[I]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense." *Id.* (citation omitted). *Sweatt* explained:

> When interpreting a statute, we must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" "Contextual understanding of statutes is generally grounded in the doctrine of noscitur a sociis: 'it is known from its associates,' see Black's Law Dictionary (6th ed), p 1060. This doctrine stands for the principle [of interpretation] that a word or phrase is given meaning by its context or setting." . . . Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. . . . Therefore, "[a] statute must be read in its entirety . . . ." [*Id.* at 179-180 (some citations omitted).]

In saying that "the assets of a [retirement] system shall be used for the exclusive benefit of the participants and their beneficiaries," MCL 38.1133(6) simply directs that the system's "assets" not be "shared with others."[18] Thus, under the plain language of MCL 38.1133(6), the "exclusive benefit" rule can only be violated if a system's "assets" are "shared with others." Because that indisputably did not happen, there was no violation of MCL 38.1133(6). As even the Court of Appeals was forced to acknowledge, the "assets" at issue, "once part of the IEF and now part of the defined benefit plan assets on the accounting records, *were still to be used for the benefit of participants and their beneficiaries in the form of regular pension payments.*" (COA Op at 18) (emphasis added). That should have been the end of the analysis.

But the Court of Appeals did not stop there. Instead, the Court of Appeals improperly focused on what it perceived to be the "effect," "result," and "impact" of the 2010 ordinance, instead of whether Wayne County actually used "assets" of the Retirement System for any purpose other than paying retirement benefits. (COA Op at 18). For example, the Court of Appeals stressed how, in its view, the "result of the 2010 ordinance" was that "the County obtained the authority to use the excess IEF assets advantageously and for its own financial good and benefit." (*Id.*). But the Court of Appeals completely fails to explain how Wayne County

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[18] Again, this is the definition of "exclusive" that the Court of Appeals used. As discussed, Wayne County does not take issue with the dictionary meaning of the term "exclusive" in isolation, but rather with the manner in which the Court of Appeals applied it.

could have used IEF assets for its "own financial good and benefit" when *they never left the Retirement Systems* and instead were *always* dedicated exclusively to paying benefits.

There is no question that a "result" of any transfer of IEF assets to the defined benefit plans reduced Wayne County's own contribution to the defined benefit plans. Even without a direct ARC offset, a transfer of $32 million into the defined benefit plans by upholding the $12 million IEF maximum limit would have resulted in a recalculated ARC, but the Court of Appeals' ruling also prevented any such reduction in the current size of the IEF. But that is not the sort of "benefit" that MCL 38.1133(6) is addressing when it provides that "assets" of a retirement system shall be for the "exclusive benefit" of participants and their beneficiaries. While there is no question that the transfer had an "impact" that was "beneficial to the County," Wayne County did not use Retirement System assets for its own "benefit" within the meaning of MCL 38.1133(6) because *Retirement System* assets were never used for any purpose other than to pay benefits to *Retirement System* participants and their beneficiaries, which is all that MCL 38.1133(6) is concerned with.

In fact, the Court of Appeals could only reach its conclusion if the IEF were its own separate retirement "system," instead of merely a fund *within the Wayne County Retirement System.* The Court of Appeals erroneously focused on the 2010 ordinance's "operational effect" *on the IEF*, as opposed to the retirement "system" as a whole. The Court of Appeals noted that the IEF's balance was "decreased by $32 million down to $12 million," and variously asserted that the 2010 ordinance "improperly invaded the *assets of the IEF*" and "depleted and redirected *IEF assets* that had been designated for . . . payment of 13th checks." (COA Op at 19-21) (emphasis added). The Court of Appeals repeatedly treated the IEF (in quite colorful language) as though it were completely untouchable:

> The ordinance effectively allowed defendants to satisfy ARC obligations through an accounting transaction that substantially depleted assets that had accumulated in the IEF and were chiefly designated for 13th checks, shifting and adding the "excess" IEF assets to the defined benefit plan assets . . . .
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> * * *
>
> Although the redirected IEF assets would still ultimately go to retirees and survivor beneficiaries under the 2010 ordinance, the IEF was created as a distinct and separate reserve that was never devoted to the payment of standard accrued pension benefits, but was instead primarily intended and designed for the payment of 13th checks. . . . And, although their assets were pooled and invested together, the IEF received individualized treatment that was distinguishable from that given to the fund of defined benefit plan assets, effectively resulting in fund segregation.
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> . . . [C]ertain monies were earmarked for the IEF and the 13th check program and then later appropriated by the County, much to its benefit, in order to pay the ARC. . . . It was as if the County Board reached into the pockets of the Retirement System [and] retrieved Retirement System funds previously allocated to the IEF for 13th checks . . . . [*Id.* at 3, 23-24.]

Nothing in MCL 38.1133(6)'s "exclusive benefit" rule prevents an employer from *reallocating the assets inside a retirement system*, which is all that occurred here.[19] The IEF is merely a separate fund *within the Wayne County Retirement System*, just like the system's defined benefit plans and its defined contribution plan. The plain and unambiguous language of MCL 38.1133(6) requires nothing more than that "*assets of the system* shall be for the exclusive benefit of the participants and their beneficiaries." (Emphasis added). Nothing in the plain language of the statute requires that assets in the IEF be used for purposes *specific to the IEF*, i.e., to pay discretionary bonuses. Thus, the fact that the $32 million transferred from the IEF back into the defined benefit plans was not used *to distribute 13th checks* does not mean that the

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[19] This of course requires that the reallocation of assets does not diminish or impair an "accrued financial benefit" in violation of Const 1963, art 9, § 24, which even the Court of Appeals acknowledged did not happen here. (See COA Op at 19) ("[T]here is no vested or enforceable right to a 13th check given the discretionary distribution language that has always been part of the IEF ordinance, along with the lack of any CBA language requiring disbursement of a 13th check.").

"system's assets" were somehow used for purposes other than paying benefits to Retirement System participants and their beneficiaries.[20] No matter how dramatic the Court of Appeals' characterization that retirement "system" assets were "retrieved," "removed," "raided," "dipped into," or otherwise "used," the fact remains that the assets of the system remain completely intact and available for the payment of benefits.[21]

Finally, in suggesting that Wayne County was required to provide a "legal basis" for its 2010 ordinance, the Court of Appeals erred by turning the burden on its head. The 2010 ordinance was based on the authority expressly granted to Wayne County under Michigan law. A county has the powers given by the Michigan Constitution and by the Legislature, see Const 1963, art 7, § 8 ("[County] [b]oards of supervisors shall have legislative, administrative and such other powers and duties as provided by law."), which includes the power to adopt a pension system for county employees. See MCL 46.12a; *Wayne Co v Wayne Co Ret Comm'n,* 267 Mich App 230, 250; 704 NW2d 117 (2005) (recognizing the Wayne County Retirement Ordinance as the duly-enacted "local law[] governing the local retirement system"). Through the 2010 ordinance, Wayne County simply amended its retirement ordinance, as it was fully authorized to do. See Wayne County Charter § 6.111 ("The Wayne County Employees Retirement System

[20] The Court of Appeals' reliance on § 141-32(f) of the 2010 ordinance is similarly flawed. Section 141-32(f) directed Wayne County's chief financial officer to "explore and report" on whether it is feasible to "reimburse" the IEF at some point. (See COA Op at 18-19). But the notion of "reimbursing" the IEF has nothing whatsoever to do with whether "assets" were removed from the Retirement System.

[21] Equally irrelevant are the views of the Retirement Commission's witnesses. The Court of Appeals found support for its "characterization of the 2010 ordinance, the IEF, and the relationship to each other" in affidavits submitted by Judith Kermans, Augustus Hutting, and Ronald Yee, all of whom described the IEF as a fund intended for the payment of 13th checks. This merely states the obvious, and offers no support whatsoever for the Court of Appeals' conclusion that transferring assets from the IEF back into the defined benefit plans violates MCL 38.1133(6).

created by ordinance is continued for the purpose of providing retirement income to eligible employees and survivor benefits. The County Commission may amend the ordinance, but an amendment shall not impair the accrued rights or benefits of any employee, retired employee, or survivor beneficiary.").[22] A duly-enacted ordinance is presumed to be valid unless proven otherwise. *Detroit v Qualls*, 434 Mich 340, 364; 454 NW2d 374 (1990) ("It is well established in Michigan that ordinances are presumed valid and the burden is on the person challenging the ordinance to rebut the presumption."). The Court of Appeals plainly erred by effectively applying the *opposite* presumption.

The judiciary's role is of course not to consider either the perceived (and inherently subjective) "fairness" of the 2010 ordinance or Wayne County's "motive" in enacting it, but whether the ordinance violates either Michigan law or the Michigan constitution. See *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994) ("'The duty of the Court is to interpret the statute as we find it. The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere.'") (citation omitted); *People v Gardner*, 143 Mich 104, 106; 106 NW 541 (1906) ("[I]n passing ordinances, a [municipality] acts under delegated authority, as an inferior legislative body. Nothing is better settled than the rule that the motives of a legislature or of the members cannot be inquired into, for the purpose of determining the validity of its laws.").[23] Because the ordinance violates neither, the Court of Appeals had a duty to uphold it.

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[22] See <http://www.waynecounty.com/documents/commission_docs/WayneCountyCharter.pdf> (accessed June 9, 2013).

[23] It is apparent the Court of Appeals' analysis was driven by such considerations. For example, at page 18 of its opinion, the Court of Appeals *expressly* cited Wayne County's purported "motive behind enacting the ordinance in the first place." (COA Op at 18).

2. The Court of Appeals' "exclusive benefit" analysis disregards MCL 38.1140m, which expressly permits transfers and offsets similar to that under the 2010 ordinance.

The Court of Appeals' interpretation of MCL 38.1133(6) is incompatible with MCL 38.1140m which expressly permits transfers and offsets similar to that of the 2010 ordinance. MCL 38.1140m provides that "[i]n a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability."[24] Thus, as the Court of Appeals was forced to concede, MCL 38.1140m specifically *authorizes* the very sort of offset that the Court found MCL 38.1133(6) to *prohibit*. In fact, the Court of Appeals expressly recognized that an offset under MCL 38.1140m "could be viewed as being used for the benefit of the public employer by effectively diminishing the employer's ARC." (COA Op at 21).

Instead of construing MCL 38.1133(6) in harmony with MCL 38.1140m, the Court of Appeals tersely and summarily dismissed MCL 38.1140m as an exception to MCL 38.1133(6) that is "not implicated with respect to the offset in the 2010 ordinance." (COA Op at 21). The Court of Appeals' interpretation of MCL 48.1133(6) creates an unnecessary conflict between MCL 38.1133(6) and MCL 38.1140m.

Although the Court of Appeals cited the principle that "'where a statute contains a general provision and a specific provision, the specific provision controls,'" *Duffy v Dep't of*

[24] It is important to note that MCL 38.1140m operates under different circumstances than here. MCL 38.1140m applies only to offsets using "accrued assets" held within a traditional defined benefit plan, whereas the offset under the 2010 ordinance uses assets held in the discretionary IEF. Because those assets are not included in the Retirement Commission's calculation of the defined benefit plans' accrued assets or actuarially accrued liabilities, and are instead used for the purpose of making discretionary 13th check distributions, MCL 38.1140m is not implicated here, as the trial court correctly determined and as the Court of Appeals conceded. (See COA Op at 29 ("[W]e have not invalidated the offset pursuant to MCL 38.1140m . . . .") and 30 ("MCL 38.1140m appears to only address ARCs relative to defined benefit plans . . . .").

Natural Resources, 490 Mich 198, 215; 805 NW2d 399 (2011) (citation omitted), it ignored that the general/specific canon of interpretation only applies when statutory provisions "seemingly conflict." See *Frame v Nehls*, 452 Mich 171, 176 n 3; 550 NW2d 739 (1996). There is no "conflict" between MCL 38.1133(6) and MCL 38.1140m under Wayne County's and the trial court's construction. The Court of Appeals *should have* applied the rule that courts must read provisions of a statute together "to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *World Book v Mich Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). Instead of viewing the offset permitted under MCL 38.1140m as some sort of one-off "exception" to the exclusive benefit rule, the Court of Appeals should have viewed it as being consistent with the notion that so long as retirement "system" assets are ultimately used for the "exclusive" purpose of paying benefits, there is no violation of the "exclusive benefit" rule.

3. The Court of Appeals' analysis also contradicts persuasive authority from outside of Michigan, including the United States Supreme Court's interpretation of ERISA's "exclusive benefit" rule.

ERISA's exclusive benefit rule is indistinguishable from MCL 38.1133(6) and provides that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 USC 1103(c)(1).

This Court routinely consults federal precedent when construing state statutes that have analogous provisions. *See, e.g., Quinn v Police Officers Labor Council*, 456 Mich 478, 482 n 1; 572 NW2d 641 (1998) ("Because our state labor statutes are patterned after the National Labor Relations Act, we examine federal construction of analogous provisions of the NLRA for guidance in construing our own labor statutes"); *Evening News Ass'n v City of Troy*, 417 Mich

481, 495; 339 NW2d 421 (1983) ("[T]he similarity between the [Michigan Freedom of Information Act] and the federal act invites analogy when deciphering the various sections") (citations and internal quotation marks omitted); *People v DeClerk*, 400 Mich 10, 23; 252 NW2d 782 (1977) (construing Michigan statute "[i]n light of the United States Supreme Court decisions interpreting Federal consumer legislation analogous to [MCL 290.631"). See also *People v Schaeffer*, 473 Mich 418, 439 n 67; 715 NW2d 822 (2005) (construing MCL 257.617 based upon federal cases "construing an analogous federal criminal statute [21 USC 841]") (subsequently reversed on other grounds). Accordingly, federal precedents applying ERISA's exclusive benefit rule are persuasive authority in construing MCL 38.1133(6).

In *Hughes Aircraft Co v Jacobson*, 525 US 432; 119 S Ct 755; 142 L Ed 2d 881 (1999), the plaintiffs claimed that Hughes violated ERISA's exclusive benefit rule (a/k/a "anti-inurement" provision) by amending a company pension plan to provide for an early retirement program and a noncontributory benefit structure using surplus plan assets. *Id.* at 435, 442. The plaintiffs claimed that Hughes improperly benefited from the change in plan structure, because by using the pension plan to fund an early retirement program, Hughes reduced its labor costs by using the plan's surplus to cover its own funding obligations. *Id.* at 441-442.

The United States Supreme Court held that because Hughes continued to use plan assets for the sole purpose of paying its obligations to the plan's beneficiaries, Hughes "could not have violated" the exclusive benefit rule. See *id.* at 442-443. As *Hughes* recognized, the use of plan assets to pay obligations to plan beneficiaries is, by definition, a use of plan assets for the exclusive benefit of participants:

> Respondents do not dispute that Hughes used fund assets for the sole purpose of paying pension benefits to plan participants . . . . Because . . . respondents do not allege that Hughes used any of the assets for a purpose other than to pay its

> obligations to the Plan's beneficiaries, Hughes could not have violated the anti-inurement provision under ERISA § 403(c)(1). [*Id.* at 442-443.]

Since *Hughes*, the Supreme Court has confirmed that 28 USC 1103(c)(1) "demands only that plan assets be held for supplying benefits to plan participants." *Raymond B Yates, MD, PC Profit Sharing Plan v Hendon*, 541 US 1; 124 S Ct 1330, 1334; 158 L Ed 2d 40 (2004).

Given the striking similarity between 29 USC 1103(c)(1) and MCL 38.1133(6), and the factual parallels between *Hughes* and the present case, the Court of Appeals should have followed its reasoning in construing MCL 381133(6). But the Court of Appeals instead casually dismissed *Hughes* and engaged in a tortured effort to distinguish it.

The Court of Appeals first observed that the plaintiffs in *Hughes* were found to have "no entitlement to share in a plan's surplus – even if it is partially attributable to the growth of their contributions," whereas "[h]ere, retirees and survivor beneficiaries *as a group* had an entitlement to share in the IEF assets at some juncture, as those assets had been specifically allocated and were intended for distribution to retirees and survivor beneficiaries in the form of 13th checks." (COA Op at 22, citing *Hughes*, 525 US at 440). Wayne County will discuss in detail in the next section the plain error in the Court of Appeals' novel and unsupported "group" entitlement theory, but suffice it to say that whether or not the plaintiffs in *Hughes* were entitled to share in surplus plan assets had nothing whatsoever to do with the Supreme Court's analysis of 29 USC 1103(c)(1).

Following the same flawed "group entitlement" rationale, the Court of Appeals also cited the fact that *Hughes* involved use of "surplus assets" that were "never earmarked for anything but the future distribution of defined benefit plan payments to retirees in general," whereas "the $32 million in the IEF that was shifted to the defined benefit plan assets simply did not constitute true 'surplus' assets," but instead were "segregated" and "primarily intended and designed for the payment of 13th checks." (COA Op at 23). But there are two problems with this superficial distinction. *First,* it completely ignores the thrust of the *Hughes* Court's analysis, which is that it cannot be said that the exclusive benefit rule has been violated so long as plan assets, "surplus" or not, are used for the exclusive purpose of paying benefits to the participants.

Second, the Court of Appeals is, once again, treating the IEF as though it were its own independent retirement "system," when in fact the IEF is merely a "fund" residing *within* the Retirement System from which assets were transferred to another part of the system. Federal courts have long held that such intra-system transfers do not violate the exclusive benefit rule, and there is nothing in the language of MCL 38.1133(6) compelling a different result. See *United Mine Workers of Am Health & Ret Funds v Robinson*, 455 US 562, 572; 102 S Ct 1226; 71 L Ed 2d 419 (1982) (construing the requirement under § 302(c)(5) of the Labor Management Relations Act that an employee benefit trust fund be used for the "sole and exclusive benefit of the employees . . . and their families and dependents" and holding that it does not preclude "allocation of the funds among the persons protected"); *Holliday v Xerox Corp*, 732 F2d 548, 549-552 (CA 6, 1984) (holding that ERISA's exclusive benefit rule was not violated by "the transfer of funds from one pension account to another *within the company's pension plan*, and the subsequent use of those funds as a setoff in calculating the retirement income owed to employees under [a] new guaranteed minimum retirement income plan" (emphasis added).

The Court of Appeals further found that, unlike the plan amendment in *Hughes*, the 2010 ordinance provided a benefit to Wayne County that was more than "incidental," which the Court defined as "happening or likely to happen in an unplanned or subordinate conjunction with something else," or "incurred casually and in addition to the regular or main amount." (COA Op at 24-25, citing *Random House Webster's College Dictionary* (2001)) (internal quotation marks omitted). According to the Court of Appeals, "[i]t cannot honestly and reasonably be disputed that the main purpose of the 2010 ordinance was to benefit the County by reducing the amount of money that the County had to directly pay to satisfy the ARC," and that this "benefit" was "certainly not unplanned or incurred casually." (*Id.*). But once again, the Court of Appeals' analysis misses the mark completely. Nothing in *Hughes* suggests that the exclusive benefit rule depends on evaluating either the employer's purported motivation for amending a retirement plan or the monetary value of any effect of the amendment. Under *Hughes*, the question is simply "Were plan assets actually used for some purpose other than paying benefits?" If not, there is no violation of the exclusive benefit rule. By going beyond that, the Court of Appeals plainly erred.

In fact, it is apparent from the Court of Appeals' treatment of *Hughes* that it really does not understand *Hughes* at all. In concluding its discussion, the Court of Appeals summarized *Hughes* as standing for the "unremarkable proposition that an employer, for purposes of ERISA, can use surplus defined benefit plan assets as an offset against required contributions." (COA Op at 25). But nowhere did the *Hughes* Court suggest that its exclusive benefit rule analysis turned on whether "surplus defined benefit plan assets" were being used "as an offset against required contributions." The principle to be derived from *Hughes* is that there is no violation of the exclusive benefit rule so long as plan assets are used to pay retirement benefits. By straining to read any more than that into it, the Court of Appeals missed the point of *Hughes* entirely.

The Court of Appeals also misunderstood the significance of the California Court of Appeal's decision in *Claypool v Wilson*, 4 Cal App 4th 646; 6 Cal Rptr 2d 77 (1992). In *Claypool*, the court rejected a claim that the California legislature violated California's exclusive benefit rule and otherwise "invaded" funds "held in trust for the benefit of [California Public

Employees' Retirement System ("PERS")] members" when it repealed former supplemental cost-of-living (COLA) programs and "direct[ed] that the funds be used to offset contributions otherwise due from PERS employers." *Id.* at 652, 660-661. The *Claypool* court held that there was no violation of the exclusive benefit rule, which in California is found in Cal Const 1879, art 16, § 17,[25] because using the former supplemental COLA funds to reduce the employer contributions otherwise necessary to keep the retirement system "in actuarial trim does not invade" the retirement system because funds "continue to be 'held for the exclusive purposes of providing benefits to participants . . . .'" *Id.* at 674 (citation omitted).

In addition to dismissing *Claypool* as an "aberration," the Court of Appeals tried unpersuasively to distinguish it even though the credit and offset provided under the 2010 ordinance is functionally the same as that upheld in *Claypool.* Like the California legislature's action in *Claypool*, the 2010 ordinance in no way authorizes the use of Retirement System assets for *Wayne County's* benefit. On the contrary, the assets never left the Retirement System. They were merely transferred to the Defined Benefit Plans for the direct benefit of the plans' participants, just as in *Claypool.*

Just as with its effort to avoid the plain import of *Hughes*, other reasons given by the Court of Appeals for distinguishing *Claypool* are unconvincing. While the Court of Appeals primarily relied on certain language used in the former COLA programs to alert participants to the possibility that their availability may be "limited" (COA Op at 25-26), an examination of

[25] "Notwithstanding provisions to the contrary in this section and Section 6 of Article XVI, the Legislature may authorize the investment of moneys of any public pension or retirement system, subject to all of the following: (a) The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the retirement system and their beneficiaries and defraying reasonable expenses of administering the system. . . ."

Claypool reveals that this "limiting or restrictive language" had nothing whatsoever to do with the *Claypool* court's exclusive benefit rule analysis.

The other ground cited by the Court of Appeals for distinguishing *Claypool* is even weaker. The Court of Appeals reasoned that while the California legislature enacted a "new alternative COLA program," there were "no comparable new advantages to county retirees [under the 2010 ordinance]; the 13th check program was eviscerated absent mandatory reimbursement of the $32 million." (*Id.* at 26). In support of this distinction, the Court of Appeals cited a single passage from *Claypool* where the court stated that "[t]he saving of public employer money is not an illicit purpose if changes in the pension program are accompanied by comparable new advantages to the employee." (*Id.* at 26, citing *Claypool*, 4 Cal App 4th at 665). The problem is that this comment from *Claypool* came from an entirely different part of the court's opinion addressing whether the California Legislature's modification of the supplemental COLA programs was "reasonable." It played no part in the *Claypool* court's discussion of the exclusive benefit rule.

Rather than straining to distinguish or otherwise avoid *Hughes* and *Claypool*, the Court of Appeals should have viewed those decisions as persuasive indicators that its proposed exclusive benefit rule analysis was unsound. Instead, the Court of Appeals adopted a distorted view of the exclusive benefit rule that, by all accounts, no other court has embraced.

4. In disregard of this Court's decisions in *Studier* and *In re Advisory Opinion*, the Court of Appeals analysis improperly treats IEF assets as though they are vested benefits.

The final, and perhaps most serious, flaw in the Court of Appeals' exclusive benefit analysis is its apparent treatment of 13th checks as something to which "retirees and their survivor beneficiaries" "as a group" have an "entitlement." The Court of Appeals' misguided view that once the IEF was established funds could only be used for payment of 13th checks and could not be transferred back into the defined benefit plan under any circumstances plainly influenced its erroneous exclusive benefit rule analysis. The Court of Appeals even went so far as to assert that "group" 13th checks "could arguably be viewed as an accrued financial benefit" for purposes of Const 1963, art 9, § 24 (see COA Op at 20 n 23 and 22), which provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

This is perhaps the most disturbing part of the Court of Appeals' opinion, because the Court of Appeals itself, just one page earlier, had already concluded – and correctly so – that "payment of a 13th check cannot be viewed as an accrued financial benefit, where there is no vested or enforceable right to a 13th check given the discretionary distribution language that has always been part of the IEF ordinance, along with the lack of any CBA language requiring disbursement of a 13th check." (*Id.* at 19). It is mystifying how the Court of Appeals could conclude, on the one hand, that 13th checks are not an individual "accrued financial benefit," but then turn around and state, without authority, that they could be considered a "group" entitlement.

But more importantly, the Court of Appeals' view directly conflicts with both *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), and *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011). In *Studier*, 472 Mich 642, this Court examined the term "accrued financial benefit" and explained that Const 1963, art 9, § 24 "only protects those financial benefits that increase or grow over time." *Id.* at 654. In addition, the Court stressed that "accrued" financial benefits "consist only of those '[f]inancial benefits arising on account of service rendered in each fiscal year.'" *Id.* at 655, quoting Const 1963, art 9, § 24.

Applying those concepts in *Studier*, the Court concluded that health care benefits paid to public school retirees did not constitute "accrued financial benefits" that were subject to protection from diminishment or impairment under art 9, § 24, because the health care benefits did not "increase or grow over time" and thus were not "accrued" benefits:

> The ratifiers of our Constitution would have commonly understood "accrued" benefits to be benefits of the type that increase or grow over time—such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed. Health care benefits, however, are not benefits of this sort. Simply stated, they are not accrued. . . . [N]either the amount of health care benefits a public school employee receives nor the amount of the premium, subscription, or membership fee that MPSERS pays increases in relation to the number of years of service the retiree has performed. [*Id.* at 654.][26]

The Court again considered what is an "accrued financial benefit" in *In re Request for Advisory Opinion*, 490 Mich 295. At issue in that case was a statute that, among other things, eliminated a longstanding tax exemption for public pensions. Finding no violation of Const 1963, art 9, § 24, the Court began its analysis by observing that the "obvious intent of § 24" was to "ensure that public pensions be treated as contractual obligations that, once earned, could not be diminished." *Id.* at 311. This is because "[b]efore § 24 was adopted, '[i]t had long been the general rule that pensions granted by public authorities were not contractual obligations but gratuitous allowances which could be revoked at will by the authority because the pensioner was not deemed to have had any vested right in their continuation.'" *Id.*

However, the Court explained, "Const 1963, art 9, § 24 . . . says nothing about whether these pension benefits can be taxed." *Id.* at 312. The Court thus examined whether a tax

[26] The Court also found that such benefits "do not qualify as 'financial' benefits." *Id.* at 655.

exemption could be considered an "'accrued financial benefit' of a pension plan." *Id.* at 313. The Court found that it could not, because a pension-tax exemption "does not 'grow over time'":

> During a state employee's working years, his or her pension-tax exemption, as opposed to the pension itself, cannot be said to be growing or accumulating because it does not even "come into existence" or "vest" until after the employee has retired and begins to collect his or her pension benefits. That is, one does not have a right to a tax exemption until one has received the funds that are subject to the exemption. Absent those funds, there is no tax exemption. And once a retiree has begun to receive his or her pension benefits, the tax exemption itself still does not "grow over time," but remains fixed. Therefore, a tax exemption is not an "accrued financial benefit." [*Id.* at 314-315.]

The Court further concluded that a pension-tax exemption was not a benefit that arose "on account of service rendered in each fiscal year," as required by the second clause of Const 1963, art 9, § 24:

> The second clause of Const 1963, art 9, § 24 states, "Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities." This clause confirms that a tax exemption is not an "accrued financial benefit" protected by § 24 because it would be impossible to fund a tax exemption, as opposed once again to the pension itself, in the year that the service was rendered in light of the fact that an exemption's value is entirely a function of the tax rate of the taxpayer at the time that the exemption is actually taken—something that obviously cannot be known at the time the services themselves are rendered. [*Id.* at 315.]

Finding its analysis to be consistent with the constitutional convention debates – in which the framers stressed that art 9, § 24 's focus was on protecting "the deferred compensation in any pension plan" – the Court explained that "[t]he 'deferred compensation' protected as a 'contractual obligation' by § 24 is the pension payments themselves earned by the retiree, while the tax exemption is something distinct and is not the subject of § 24. The tax exemption is simply a postdistribution effect of the accrued financial benefits that have otherwise been paid in full." *Id.* at 318 (citations and some internal quotation marks omitted).

In suggesting that there may be a group "entitlement" to 13th checks for purposes of art 9, § 24, the Court of Appeals completely ignored this Court's decisions in *Studier* and *Advisory Opinion*, under which 13th checks cannot be said to be "accrued financial benefits." Like the pension-tax exemption in *In re Advisory Opinion*, 13th checks do not "increase or grow over time." What the Court said about pension-tax exemptions in *In re Advisory Opinion* applies equally here. During a county employee's "working years," the 13th check "cannot be said to be growing or accumulating because it does not even 'come into existence' or 'vest' until after the employee has retired." *Id.* at 314. Nor does the 13th check "grow over time" in retirement. In fact, the Court of Appeals acknowledged that 13th check payments *fluctuate from year to year, at times even decreasing*. (See COA Op at 10).

More importantly, the 13th checks do not arise "on account of service rendered in each fiscal year," as required by the second paragraph of art 9, § 24. The Court's decision in *Advisory Opinion* is particularly instructive on this point. There, the Court concluded that a benefit cannot be one that arises "on account of service rendered in each fiscal year" unless it can be "fund[ed] . . . in the year that the service was rendered." *In re Advisory Opinion*, 490 Mich at 315. The Court reasoned that pension-tax exemptions did not meet this requirement because they are a function of "the tax rate of the taxpayer at the time that the exemption is actually taken," as opposed to when the employee's services are actually rendered. *Id.* Thus, it is "impossible to fund a tax exemption, as opposed . . . to the pension itself, in the year that the service was rendered." *Id.* The same analysis applies to the 13th checks. By their very nature, they cannot be funded in the year service was rendered because the discretionary decision whether to even make a 13th check distribution is not made until *after the employee retires*. This is in contrast to the employee's regular pension, which is calculated and funded during his or her working years.

As can be seen from a review of the Court's opinion in *In re Advisory Opinion*, any "benefit" that is determined *after* an employee retires cannot, by definition, be one that arises "on account of service rendered in each fiscal year." The Court of Appeals made the same point in its unpublished opinion in *Hannan v Detroit City Council*, unpublished opinion per curiam of the Court of Appeals, issued September 1, 2000; 2000 Mich App LEXIS 980 (Docket No. 211704) (attached at Tab C, Ex 8 to Wayne County's COA Br on Cross-Appeal). In *Hannan*, the Court addressed whether Const 1963 art 9, § 24, was violated when the Detroit City Council passed an ordinance increasing the benefits of certain "qualified retirees." *Id.* at *1. The Court found that art 9, § 24 *did not even apply* to the pension enhancement ordinance because it only affected "retirees and not those that are currently working and accruing financial benefits, " i.e., it conferred a benefit "that was not earned during the year the benefit was given." *Id.* at *7.

The 13th checks are exactly the same as the pension enhancements at issue in *Hannan*. The decision whether to distribute 13th checks, including the amounts of those distributions, is made only *after* an employee retires. As a result, they "confer a benefit that was not earned during the year the benefit was given," and art 9, § 24, simply does not apply to them. Yet the Court of Appeals panel here, without any authority or analysis, suggested that Retirement System participants and their beneficiaries have a "group" "entitlement" to 13th checks for purposes of art 9, § 24. The Court of Appeals' disregard of this Court's decisions in *Studier* and *In re Advisory Opinion* provides yet another reason for this Court to intervene and correct the dangerous precedent that the Court of Appeals' decision establishes.

C. The Court of Appeals misconstrued MCL 38.1133(6)(c) when it concluded that the transfer of assets from the discretionary IEF back into the defined benefit plans was a "prohibited transaction."

The Court of Appeals further concluded that the transfer of assets from the IEF to the defined benefit plans constituted a "transaction" in violation of MCL 38.1133(6)(c), which prohibits a fiduciary from engaging in transactions resulting in "[a] transfer to, or use by or for the benefit of, the political subdivision sponsoring the system of any assets of the system for less than adequate consideration." That holding assumes that the ordinance violated the exclusive benefit rule, and as with its finding of a violation of the "exclusive benefit" rule, the Court of Appeals' analysis of MCL 38.1133(6)(c) is completely wrong.

1. The 2010 ordinance does not result in any of the three types of "transactions" described in MCL 38.1133(6)(c).

Although the Court of Appeals focused on subsection (c), MCL 38.1133(6) actually addresses several "transactions" that a system is not permitted to engage in:

> With respect to a system, an investment fiduciary shall not cause the system to engage in a transaction if he or she knows or should know that the transaction is any of the following, either directly or indirectly:
>
> (a) A sale or exchange or leasing of any property from the system to a party in interest for less than fair market value, or from a party in interest to the system for more than the fair market value.
>
> (b) A lending of money or other extension of credit from the system to a party in interest without the receipt of adequate security and a reasonable rate of interest, or from a party in interest to the system with the provision of excessive security or at an unreasonably high rate of interest.
>
> (c) A transfer to, or use by or for the benefit of, the political subdivision sponsoring the system of any assets of the system for less than adequate consideration.
>
> (d) The furnishing of goods, services, or facilities from the system to a party in interest for less than adequate consideration, or from a party in interest to the system for more than adequate consideration. [MCL 38.1133(6)(a)-(d).][27]

MCL 38.1133(6)(c) prohibits (1) a "transfer" of assets from a retirement system "to" the system sponsor, (2) the "use" of retirement system assets "by" the system sponsor, and (3) the

[27] As previously mentioned, the statute was amended effective March 28, 2013. Just like the exclusive benefit rule, the prohibited transaction rule was moved to subsection (8) in the new statute.

"use" of retirement system assets "for the benefit of" the system sponsor. Despite the Court of Appeals' conclusory assertions, none of these "transactions" occurred here.

With regard to the first type of prohibited transaction (i.e., a "transfer" of assets from a retirement system "to" the system sponsor), the Court of Appeals concluded, without analyzing any of the statutory language, that the 2010 ordinance involved, "*effectively*, an unlawful transfer of assets to the County for use to satisfy obligations relative to the ARC." (COA Op at 27 (emphasis in original and citation omitted)). However, there is no basis for that assertion because, as discussed previously, the IEF assets *never left the Retirement System*. The 2010 ordinance certainly does not require or authorize a "transfer" of system "assets" to the County. Rather, the 2010 ordinance provides for an entirely *intra-system* transfer of assets – from the Retirement System's IEF to its defined benefit plans. While the Court of Appeals may have found this to be an "effective" transfer of "assets" to Wayne County, MCL 38.1133(6)(c) does not address "effective" transfers. It prohibits an actual "transfer," which is defined as "to convey from one person, place, or situation to another." *Merriam-Webster Online Dictionary* <http://www.merriam-webster.com/dictionary/transfer> (accessed June 11, 2013). By no stretch of the imagination was there an actual "transfer" of assets to Wayne County here.[28]

As to the second type of prohibited transaction in MCL 38.1133(6)(c) (a "use" of retirement system assets "by" the system sponsor), the Court of Appeals concluded, again without analyzing any of the statute's actual language, that "the 2010 ordinance effectively . . .

[28] Plaintiffs may argue that because MCL 38.1133(6) applies to both "direct" and "indirect" transfers, an "indirect" transfer is the same thing as an "effective" transfer. But the language of the statute does not support such an interpretation. An "indirect" transfer would be a transfer to a third party, followed by a transfer from the third party to the plan sponsor. The point of specifying that "indirect" transfers are prohibited along with "direct" transfers is simply to avoid the use of a third party as a go-between. Even an "indirect" transfer still requires "assets" to actually leave the retirement system.

permitted or authorized the County to use . . . assets in the IEF." (COA Op at 26). Once again, the Court of Appeals was forced to hang its hat on the notion that Wayne County "effectively" made use of IEF assets because Wayne County clearly did not make *actual* "use" of the assets. Rather, the "assets" were simply transferred from the IEF to the defined benefit plans, where they were set aside for the "use" of the Retirement System in paying benefits to participants. Because the assets never left the Retirement System, they cannot be said to have been put to the County's own "use."

Finally, the Court of Appeals concluded that the 2010 ordinance also violated the third type of "transaction" prohibited by MCL 38.1133(6)(c) (i.e., the "use" of retirement system assets "for the benefit of" the system sponsor), observing that "[w]e have already found, relative to our analysis of the exclusive benefit rule, that the County benefited greatly from the use of the excess IEF assets." (COA Op at 27). As discussed, however, it cannot be said that the system's "assets" were "use[d] . . . for the "benefit" of Wayne County because they never left the Retirement System and instead were "used" solely for the payment of benefits to Retirement System participants and their beneficiaries.

2. MCL 38.1133(6) makes clear that a "prohibited transaction" is a transaction involving a retirement system and another party, and not an intra-system transfer of assets like under the 2010 ordinance.

A critical flaw in the Court of Appeals' "prohibited transaction" analysis is its assumption that MCL 38.1133(6)(c) even applies to transfers of assets *within a Retirement System,* when MCL 38.1133(6) viewed in its entirety suggests that it only applies to "transactions" between a "system's investment fiduciary" and *another party.* Indeed, subsections (a), (b), and (d) explicitly refer to transactions between the system and a "party in interest." And subsection (c) refers to transactions either (1) between the system and the "political subdivision sponsoring the system" (i.e., a "transfer to" or "use by" the system sponsor), or (2) between the system and another party that benefits the system sponsor (i.e., a "use . . . for the benefit of" the system sponsor). When read together, these four subsections mean that *intra-system* transfers are not even contemplated by MCL 38.1133(6). This is further evidenced by subsection (c)'s prohibition against the transfer or use of system assets "for less than adequate consideration." This statutory reference to "adequate consideration" is clearly alluding to transactions between a "system" and another party, and not a wholly intra-system transfer of assets.

3. The Court of Appeals' "prohibited transaction" analysis disregards MCL 38.1140m, which expressly permits a "transaction" substantially similar to the credit and offset provided for under the 2010 ordinance.

The Court of Appeals also failed to consider that PERSIA explicitly authorizes the very type of "transaction" that the Court of Appeals concluded is prohibited under MCL 38.1133(6)(c). As discussed previously, MCL 38.1140m provides that, "[i]n a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability." In short, MCL 38.1140m permits a system to credit system assets toward an employer's ARC to offset the amount that employer must contribute toward the ARC – just like the offset required by the 2010 ordinance.[29]

Courts must read provisions of a statutory scheme together "to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *World Book*, 459 Mich at 416. Thus, before concluding that the 2010 ordinance's credit and offset provision resulted in a "prohibited transaction" under MCL 38.1133(6), the Court of Appeals should have considered

[29] As already explained, MCL 38.1140m involves "excess" system assets in an overfunded system, but such a distinction is irrelevant for purposes of harmonizing MCL 38.1140m with MCL 38.1133(6)(c).

that another provision of PERSIA, MCL 38.1140m, expressly permits a nearly identical offset and sought to harmonize the two provisions. Had it done so, the Court of Appeals might have seen that the reason the offset provided under MCL 38.1140m does not constitute a "prohibited transaction" under MCL 38.1133(6) is because the retirement system's "assets" remain at all times within the system for the purpose of paying benefits to system participants, just like the assets transferred from the IEF back into the defined benefit plans under the 2010 ordinance.

4. The Court of Appeals' conclusion that the offset was a "sham" transaction is conclusory and is not supported by *Hughes*.

In bringing its "prohibited transaction" analysis to a close, the Court of Appeals took one last swipe at the 2010 ordinance by calling the credit and offset a "sham transaction." (COA Op at 27), citing *Hughes*, 525 US at 445. *Hughes*, however, fails to support that assertion. *Hughes* specifically defined a "sham transaction" as an "otherwise unlawful transfer of assets to a party in interest." *Hughes*, 525 US at 445. As discussed *supra*, there was simply no "transfer of assets" to Wayne County. While the Court of Appeals again tried to buttress its conclusion by characterizing the transfer of assets from the IEF to the defined benefit plans as "effectively" being "an unlawful transfer of assets to the County" (COA Op at 27), the notion of an "effective" transfer of assets is not supported by the plain language of MCL 38.1133(6). Because there was no "transfer" of retirement system assets to the County, and because system assets were never "use[d] by for the benefit" of Wayne County, there was no violation of the prohibited transaction rule.

IV. RELIEF REQUESTED

This case involves jurisprudentially significant issues concerning the proper interpretation and application of PERSIA's exclusive benefit and prohibited transaction provisions. In finding that Wayne County's 2010 ordinance violated those provisions, the Court of Appeals clearly erred. Therefore, Wayne County respectfully requests that this Court grant its application for leave to appeal. At the very least, because the Court of Appeals plainly erred in finding that the 2010 ordinance violates those provisions, the Court should enter a peremptory order reversing the Court of Appeals' decision and reinstating the trial court's decision granting summary disposition to Wayne County.

Respectfully submitted,

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